LIM PEY LIN

v.

CHIA FOON TAU & ANOR

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[ORIGINATING SUMMONS NO: 24-401-2000]
26 NOVEMBER 2001

CIVIL PROCEDURE: *Originating summons - Procedure by - Likelihood of substantial dispute of fact - Whether proceedings should continue as if cause or matter begun by writ - Rules of the High Court 1980, O. 28 r. 8*

LEGAL PROFESSION: *Professional discipline - Practice and Etiquette Rules - Likelihood that counsel acting for plaintiff would be called as witness for defendants - Whether counsel should be disqualified from acting in case - Legal Profession (Practice & Etiquette) Rules 1978, r. 28(a) - Whether counsel was involved in "without prejudice" communications between parties for an amicable settlement - Whether such communications privileged and inadmissible evidence - Evidence Act 1950, s. 23*

The defendants applied for the following prayers: (1) that the originating summons herein be converted into a writ under O. 28 r. 8 of the Rules of the High Court 1980 ('RHC'); and (2) the solicitors for the plaintiff, one Mr. KP Ng, his law firm and the legal assistants in his law firm be disqualified from acting in this case. In relation to the first prayer, the defendants submitted that there was a likelihood of a substantial dispute of fact that warranted the writ procedure to be invoked. In relation to the second prayer, it was submitted that the defendants intended to call Mr Ng as a witness as he was apparently present in a discussion between the parties herein for an amicable settlement. That would conflict with r. 28(a) of the Legal Profession (Practice & Etiquette) Rules 1978 ('the Rules 1978'). Against this, it was argued for the plaintiff that an advocate who represents a party in any discussion for settlement on a without prejudice basis cannot be called as a witness.

Held:

[1] From the respective affidavits and the conflicting allegation of facts herein, coupled with the submissions respectively presented for both the plaintiff and the defendants, there was no doubt that there was a likelihood of a substantial dispute of fact which would render the originating summons procedure eminently unsuitable or inappropriate. The various inconsistencies manifested in the aforesaid affidavits could only be resolved by viva voce evidence, going through the process of cross-

examination and re-examination which therefore necessitated the writ procedure to be invoked. Therefore, the proceedings should continue as if begun by way of a writ and the parties deliver their pleadings in accordance with O. 18 RHC. Also, the parties comply with O. 34 RHC. (pp 425 h-i & 426 a-g)

[2] The intention of s. 23 of the Evidence Act 1950 is to regulate the conduct of "without prejudice" communications and hence to promote peaceful settlement of disputes by way of compromise and not litigation. Otherwise, an attempt to arrive at an amicable settlement would not be possible. An affidavit which referred to "without prejudice" letters between solicitors were held to have been inadmissible. Further, oral communications made during a dispute between parties which are written or made for the purpose of settling a dispute, and which are expressed or otherwise proved to have been made "without prejudice" cannot generally be admitted in evidence. "Without prejudice" communications are held to be privileged communications. (pp 431 c-i & 432 c-d)

[3] Rule 28(a) of the Rules 1978 is merely a rule of ethics and is not to be applied totally with the stringency of the force of law. By virtue of s. 23(1) of the Interpretation Acts 1948 & 1967, the said rule would give way to s. 23 of the Evidence Act 1950 and is void to the extent of its inconsistency with that section. Therefore, r. 28(a) of the Rules 1978 was not applicable herein and it followed that there was no merit in the application to disqualify Mr KP Ng, his law firm or any legal assistants in his law firm from acting for the plaintiff. (p 432 d-g)

[First prayer allowed; second prayer dismissed; costs in the cause.]

Case(s) referred to:

Abdul Halim Abdul Hanan & Ors v. Pengarah Penjara, Taiping & Ors [1996] 4 MLJ 54 ***(refd)***

Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 4 CLJ 561 ***(refd)***

Beh Lee Liang v. Chew Sah Suak & Anor [1995] 4 MLJ 397 ***(refd)***

Bentley v. Nelson [1963] WAR 89

Cutts v. Head [1984] 1 All ER 597 ***(refd)***

Dusun Desaru Sdn Bhd v. Wang Ah Yu [1999] 2 CLJ 749 ***(foll)***

Hoghton v. Hoghton 15 Beav 278 ***(foll)***

Khoo Kheng Sim v. Khoo Chooi Leong & Anor [2001] 4 AMR 4552 ***(refd)***

Malayan Banking Bhd v. Foo See Moi [1981] 2 MLJ 17 ***(foll)***

McTaggart v. McTaggart [1948] 2 All ER 754 ***(refd)***

Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors [1985] 1 CLJ 181; [1985] CLJ (Rep) 575 ***(refd)***

Mole v. Mole [1950] 2 All ER 328 ***(refd)***

Ng Chuan Seng v. Tan Ah Yoke [1969] 2 MLJ 75 ***(refd)***
Ng Hee Thong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(foll)***
Oh Kuang Liang v. Associated Wood Ind Sdn Bhd [1995] 2 CLJ 961 ***(refd)***
Ong Ah Moy v. Nga Ah Fan & Ors [1978] 1 MLJ 177 ***(foll)***
Pool v. Pool [1951] 5 All ER 563 ***(refd)***
PP v. Vengadasalam & Ors [1990] 1 CLJ 810; [1990] 2 CLJ (Rep) 893 ***(refd)***
Rakusen v. Ellis, Munday & Clarke [1912] 1 Ch 831 ***(refd)***
Re Daintrey; ex p Holt [1893] 2 QB 116 ***(refd)***
Re Deadman (decd) Smith v. Garland & Ors [1971] 2 All ER 101 ***(refd)***
Rush & Tompkins Ltd v. Greater London Council & Anor [1989] AC 1280 HL ***(refd)***
Scott Paper Co v. Drayton Paper Works Ltd [1927] 44 RPC 151 ***(refd)***
South Shropshire District Council v. Amos [1987] 1 All ER 340 ***(refd)***
Sykt Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing t/a Bengkel Sen Tak [1997] 3 CLJ 754 ***(refd)***
Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd [1992] 3 CLJ 1685; [1992] 1 CLJ (Rep) 331 ***(foll)***
Vijayalakshmi Devi Nadchatiram v. Saraswathy Devi Nadchatiram (Beramal Undang-Undangnya Di bawah Nama dan Gaya Tetuan N Saraswathy Devi) [1996] 4 CLJ 430 ***(refd)***
Wee Choo Keong v. PP [1990] 1 CLJ 1015; [1990] 3 CLJ (Rep) 346 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 23
Interpretation Acts 1948 & 1967, s. 23(1)
Legal Profession (Practice and Etiquette) Rules 1978, rr. 27(a), 28(a), (b), (c)
Rules of the High Court 1980, O. 5 r. 4(2)(a), (b), O. 18, O. 28 r. 8(1), O. 34

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, para 212
Sarkar, *Law of Evidence*, 1993, 14th edn, p 359

For the plaintiff - KP Ng; M/s KP Ng & Amardas
For the defendants - Tee Geok Hock; M/s GH Tee & Co

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing J:

Application

This is the defendants' application in encl. (9) for an order that:

(1) the originating summons herein be converted into a writ under O. 28 r. 8 of the Rules of the High Court 1980; and

(2) En. KP Ng, his law firm and the legal assistants in his law firm be disqualified from acting in this case.

Submission For Defendants

It was submitted by En. Tee Geok Hock, learned counsel for the defendants, that where there is likely to be substantial dispute of fact, writ is the proper mode of proceedings and originating summons is not appropriate. He added that disputed facts of importance to a case should not be tried or assessed by analysis of conflicting affidavits and that such factual disputes should be tried and decided by oral testimonies of relevant witnesses who can be compelled by subpoena to testify in order to find out the truth of the matter. Order 5 r. 4(2) of the Rules of the High Court 1980 and *Ong Ah Moy v. Nga Ah Fan & Ors* [1978] 1 MLJ 177 and *Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd* [1992] 3 CLJ 1685; [1992] 1 CLJ (Rep) 331 were cited in support.

For the purposes of disqualifying En. KP Ng, his law firm and the legal assistants in his law firm from acting for the plaintiff, it was argued for the defendants that an advocate and solicitor should not appear as counsel in a case where he is likely to be called as a witness, and that Encik KP Ng was actively involved in discussions between plaintiff and second defendant touching on the subject matter of this case ie, BSN Fixed Deposit Account. The defendants' learned counsel informed the court that the defendants intend to call En. KP Ng as a witness, as a result of which he concluded that En. KP Ng, his law firm and the legal assistants in his law firm should be disqualified from acting in this case. Support for this contention was derived from the decision of Abdul Malik Ishak, J in *Sykt Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing t/a Bengkel Sen Tak* [1997] 3 CLJ 754.

Plaintiff's Response

En. KP Ng, learned counsel for the plaintiff, in response to the application for the conversion of originating summons to a writ, conceded that there is only one issue in dispute in the case herein ie, as to who is entitled to the money in the fixed deposit account. He relied on the presumption that the principle of survivorship applies so that the plaintiff who is the survivor is entitled thereto. He added that if the defendants wish to rebut the presumption, the defendants have to show special circumstances expecially as to who has contributed to the said account. However, he argued that the defendants in their affidavits have failed to affirm any allegation of facts to rebut this presumption. In this respect, he contended that even if the originating summons were to be converted to a writ, there would be no witness who could possibly give oral evidence to resolve this dispute.

On the issue of disqualifying En. KP Ng, his law firm and the legal assistants from his law firm from acting for the plaintiff, it was submitted for the plaintiff that the purpose of the discussion in which En. KP Ng was present was to achieve an amicable settlement between the plaintiff and the defendants.

He contended that as a matter of public policy and law, an advocate who represents a party in any discussion for settlement on a without prejudice basis and hence to avoid litigation cannot be called as witness, relying on *Mole v. Mole* [1950] 2 All ER 328; *McTaggart v. McTaggart* [1948] 2 All ER 754 both of which were referred to in *Ng Chuan Seng v. Tan Ah Yoke* [1969] 2 MLJ 75. He also cited *Pool v. Pool* [1951] 5 All ER 563.

He then referred to s. 23 of the Evidence Act 1950 as the discussion was conducted on a "without prejudice" basis and sought support in *Oh Kuang Liang v. Associated Wood Ind Sdn Bhd* [1995] 2 CLJ 961.

Decision Of The Court

Originating Summons Or Writ?

For the purposes of this judgment, a reference to an order or rule is a reference to that order or rule of the Rules of the High Court 1980. Order 5 sets out the mode of beginning civil proceedings in our High Courts, eg, by writ, originating summons, originating motion or petition.

Order 5 r. 4(2), on which learned counsel for the defendants (applicants) relied, provides generally that proceedings which are appropriate to be begun by originating summons are:

> (2) Proceedings –
>
> (a) in which the sole or principal question at issue is or is likely to be, one of the construction of any written law or of any instrument made under any written law, or of any deed, will, contract or other document, or some other question of law; or
>
> (b) in which there is unlikely to be any substantial dispute of fact,

The question before me is whether the proceedings herein come within the provisions of O. 5 r. 4(2)(a) or (b) so that the appropriate mode is by way of an originating summons; otherwise the writ procedure applies.

The basis of the submission for the defendants (applicants) is that there is likely to be substantial dispute of facts and so I shall only confine to the construction of O. 5 r. 4(2)(b). I shall examine the originating summons itself and the allegation of facts as deposed to by the parties in their respective affidavits.

First, the originating summons herein contains a prayer for declaration that the plaintiff is entitled to all the money in the joint fixed deposit account of the plaintiff and Chong Tze Chieh (the deceased). The joint account No. is 1-0154134-4 and there are three certificates *viz*. No. 03-0410016800382976; 04-0410016800382984 and 05-0410016800382992. The plaintiff's affidavit in

support (encl. (2)) avers, *inter alia*, that the said joint account was opened in Bank Simpanan Nasional ("the bank") on 1 October 1991. Any one of the joint accountees was jointly and severally authorised to deal with and transact therein.

After the death of one of the accountees ie, Chong Cheong @ Chong Tze Chieh on 2 March 1995, the plaintiff on 10 April 1995 through his solicitors wrote to the bank requesting a new passbook to be issued to the plaintiff and also to allow the plaintiff as the survivor to transact in the said joint account. The bank asked the plaintiff to produce the letters of administration for the deceased. Being dissatisfied, the plaintiff instructed solicitors to inform the bank that the plaintiff as survivor was entitled to transact in the said joint account without the letters of administration, but the bank still insisted on the production of the letters of administration.

In the light of these diametrically opposite views, the plaintiff filed originating summons No. 24-183-95 against the bank and the bank resisted the same. The deceased's beneficiaries who are the defendants herein have intervened in that originating summons. Events turned out that on the advice of the court, that originating summons and application to intervene were withdrawn, so that the matter can be settled amicably, which unhappily was not to be the case and hence, the originating summons herein.

In so far as the said joint account is concerned, the total amount in the bank as at 16 March 1995 was RM184,437.30, which was maintained as a result of the joint contributions of the plaintiff and the deceased from time to time.

The defendants have refused to give the bank account passbook to the plaintiff, and instead have filed a notice of counterclaim in encl. (5) praying for a declaration that the defendants as executors of the deceased's estate are entitled to all the money in the said joint account, and in addition claimed damages for wrongful misappropriation or for breach of trust.

The defendants have obtained the grant of probate from the High Court in Johor Bahru. The defendants averred in their affidavit that the plaintiff had informed the defendants that the money in the said joint account belonged to the deceased, but all negotiations for an amicable settlement of the said joint account were unsuccesssful.

From the respective affidavits generally and more specifically the conflicting allegation of facts as alluded to above, coupled with the submissions respectively presented for both the plaintiff and the defendants, there is no doubt in my mind that there is likely to be substantial dispute of fact, which would render the originating summons procedure eminently unsuitable or

inappropirate. The various inconsistencies manifested in the aforesaid affidavits could only be resolved by *viva voce* evidence, going through the process of cross-examination and re-examination, therefore necessitates the writ procedure to be invoked.

Order 28 r. 8(1) is crucial here and is reproduced as follows:

> (1) Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

It is trite law that as soon as there is a likelihood of any substantial dispute of fact, the court is empowered to make an order that an originating summons be converted and continued as a writ action: *Re Deadman (decd) Smith v. Garland & Ors* [1971] 2 All ER 101; 1 WLR 426 as approved in *Ting Ling Kiew & Anor, supra.* See also eg, *Khoo Kheng Sim v. Khoo Chooi Leong & Anor* [2001] 4 AMR 4552; *Abdul Rahim bin Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4 CLJ 561; *Beh Lee Liang v. Chew Sah Suak & Anor* [1995] 4 MLJ 397.

In *Ong Ah Moy, supra,* the Federal Court through the judgment of Chang Min Tat, FJ (as he then was) categorically stated that an originating summons was not a convenient medium to try disputed questions of fact.

On the foregoing grounds, in respect of the first prayer, I hold that the proceedings herein shall continue as if this case or matter had been begun by way of a writ and further order that the parties do deliver their pleadings in accordance with O. 18, as has been similarly ordered by the Supreme Court in *Ting Ling Kiew & Anor, supra*. I also further order that the parties herein comply with O. 34 of the Rules of the High Court 1980 as amended *vide* P.U.(A) 342/2000 and which came into force on 22 September 2000.

Disqualifying An Advocate

A prayer for an order that an advocate and solicitor, his law firm and the legal assistants in his law firm be disqualified from acting for a client in a particular case raises a fundamental question of far-reaching implications and therefore requires consideration of public policy and the law governing the legal profession. The facts of each particular case would play a pivotal role in assisting the court in arriving at a proper determination and conclusion. Each case turns on its own facts: *Rakusen v. Ellis, Munday & Clarke* [1912] 1 Ch 831; *Sykt Pengangkutan Sakti Sdn Bhd, supra.*

The facts in *Sykt Pengangkutan Sakti Sdn Bhd, supra,* reveal that the plaintiff sent a motor van JCY 5923 for repairs at the defendant's workshop. There was delay in repairing the motor van. Harsh words were exchanged between the parties. The plaintiff wanted to take their motor van from the defendant's workshop but the defendant refused to accede unless the plaintiff settled the repair charges of RM1,267. Mr Gana Muthusamy, an advocate and solicitor, ("Mr. Gana") was engaged by the plaintiff and, on the basis of that retainer, he proceeded to the defendant's workshop accompanied by a representative from the plaintiff's company. At the defendant's workshop, Mr. Gana spoke to the plaintiff and tried to persuade the latter to release the motor van belonging to the plaintiff with an undertaking by the plaintiff to settle all charges payable to the workshop but without prejudice to the right of the plaintiff to litigate the matter in a court of law. The trip to the defendant's workshop proved futile. On 14 April 1997, Mr. Gana then issued a notice to the defendant demanding the release of the motor van within three days failing which the matter would be referred to the court. On 30 April 1997, the plaintiff proceeded to the law firm of Messrs Gana Muthusamy & Co, and there he was served with the writ of summons indorsed with the statement of claim (encl. 2), a summons-in-chambers (encl. 6) and two affidavits (encls. 5 and 4). Alarmed by the turn of events, the plaintiff met Mr Chua Chong Ying, an advocate and solicitor from the law firm of Messrs Lau Kok Guan & Associates, with specific instructions to contact Mr. Gana in order to settle the matter out of court. At the hearing of encl. (6), the defendant's learned counsel argued that Mr. Gana would be called as a witness by the defendant and raised a preliminary objection that Mr. Gana, his law firm and the legal assistants in his law firm be barred from representing the plaintiff in chambers or in open court. The crucial question before Abdul Malik Ishak, J was this: would Mr. Gana jeopardise his client's interests by continuing to act for his clients when it has become apparent that he will be called as a witness by the opposing party? The statutory provision that required judicial interpretation before his Lordship was r. 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 which reads as follows:

28 Advocate and solicitor not to appear in a case where he is a witness

(a) An advocate and solicitor shall not appear in court or in chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case he becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interests.

His Lordship referred to a long list of authorities which include, *inter alia, Abdul Halim bin Abdul Hanan & Ors v. Pengarah Penjara, Taiping & Ors* [1996] 4 MLJ 54; *Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors*

[1985] 1 CLJ 181; [1985] CLJ (Rep) 575; *Vijayalakshmi Devi a/p Nadchatiram v. Saraswathy Devi a/p Nadchatiram (Beramal Undang-Undangnya Di Bawah Nama Dan Gaya Tetuan N Saraswathy Devi)* [1996] 4 CLJ 430; *PP v. Vengadasalam & Ors* [1990] 1 CLJ 810; [1990] 2 CLJ (Rep) 893; *Wee Choo Keong v. Pendakwa Raya* [1990] 1 CLJ 1015; [1990] 3 CLJ (Rep) 346. His Lordship observed that if Mr. Gana were called upon to give evidence in the witness box, Mr. Gana would be embarrassed as he could not cross-examine himself, nor could he address the court as to the credibility of his own testimony, and he would be seriously handicapped in representing his client's interest and so justice would not be done if Mr. Gana represented the plaintiff. The judgment showed that when Mr. Gana visited the defendant's workshop and spoke to the defendant, he became a witness on these material and disputed questions of facts and made the order that Mr. Gana, his law firm and all his legal assistants in his law firm be barred from representing, appearing on record or acting for the plaintiff in chambers or in open court in the present case.

In *Abdul Halim bin Abdul Hanan & Ors, supra,* the plaintiff's originating summons was supported in the main by their counsel who affirmed their averments and not by their own affidavits. Supplementary affidavits were later filed by the plaintiffs to confirm the counsel's affidavit. On the question of ethics, Kang Hwee Gee, J observed that the counsel's direct involvement in his client's case seems to have touched on the delicate question of professional ethics. After referring to r. 28, *supra,* his Lordship said that it would appear to be against ethics for counsel to swear an affidavit on a substantive allegation for his clients there and appear to plead his case in court and concluded that in order not to run foul of r. 28, *supra,* counsel should not have appeared in court and should have left the conduct of that case to another counsel. This case concerns the counsel affirming an affidavit for his client.

In *Million Group Credit Sdn Bhd, supra,* Shankar, J (later JCA) observed, *obiter,* "that the practice of solicitors themselves filing contentious affidavits in pending applications should be discouraged. The parties are the litigants and it is they who should be giving evidence". Rule 28, *supra,* was referred to. This *obiter dictum* also refers to the affirmation by counsel on client's behalf.

In *Vijayalakshmi Devi, supra,* the plaintiff applied for an order that Saraswathy Devi d/o Nadchatiram who is practising under the name and style of Messrs Saraswathy Devi or any of her legal assistants be disqualified from acting or continuing to act as advocate and solicitor for Jegadevan, Suseela Devi, Shanti and any of the brothers and sisters of the defendant in any proceedings relating to the Estate of Nadchatiram and of Nadchatiram Realities (1960) Sdn Bhd

(in liquidation) where the plaintiff is a party to the proceedings. Rule 27(a), *ibid,* came up for judicial interpretation. It prohibits an advocate and solicitor from appearing in any matter where he or she is diredily pecuniarily interested. The defendant has a direct pecuniary interest in the various matters litigated. The parties to all the actions are the siblings of Nadchatiram. The blood relationship between the defendant and the litigants is so closely connected. In the circumstances, Mohd Noor bin Hj. Abdullah, J ordered that the defendant and her legal assistants be disqualified from acting for the aforesaid individuals. It is clear from the judgment therein that r. 28(a), *supra,* was not called into question for judicial interpretation.

In *Vengadasalam & Ors, supra,* by an order of a magistrate, the accused persons' counsel was removed from acting for the accused on the ground that the counsel had been summoned to appear as a witness for the prosecution. The order came up for revision before Lim Beng Choon, J who referred r. 28(a), (b) and (c) of the said Rules. The learned judge held that it is only when a counsel is required to be a witness of a material and disputed question of fact that it is undesirable for him to appear as a counsel in the same trial and that counsel is allowed to appear to defend the three accused persons. Having said that, his Lordship observed, *obiter*, as follows:

> Although I have lifted the injunctive order restraining Mr SP Annamalai from defending the three accused persons, nevertheless, perhaps learned counsel would like to reconsider whether it would be wise for him to continue to defend his clients. Should it turn out that, in the midst of testifying, his evidence is quite material, he would have to retire and his clients would be left in the lurch, and what is worse is that he may find himself open to a charge of misconduct.

The facts in this case are substantially different from those in the case before me.

In *Wee Choo Keong, supra,* the counsel was retained by the family of a deceased detainee to hold a watching brief at an inquest, at which the magistrate upheld the prosecuting officer's objection, as the counsel's statement has been recorded and he would be called as a witness. Wan Yahya J referred to r. 28(a), *supra* and held as follows:

> This section to my mind does not envisage that an advocate and solicitor is *ipso facto* excluded from appearing as such in court the moment he believes that he will be a witness. That ethical restriction will only arise if he is likely to be a witness of any material or disputed fact. Rule 28 is a rule of ethics and the magistrate should not have applied it totally with the stringency of the force of law.

The order of the learned magistrate was varied by confining it only to that stage of the proceeding if and when the deceased's son is about to give evidence.

It is pertinent to observe that in none of the aforesaid authorities, including *Sykt Pengangkutan Sakti Sdn Bhd*, on which learned counsel for the defendant placed heavy reliance, was s. 23 of the Evidence Act 1950 brought to the court's attention. Learned counsel in all these cases did not avail themselves of the opportunity to address the court on the relationship between s. 23 of the Evidence Act 1950 and r. 28(a), *supra.*

From the respective affidavits filed by the parties and the submissions presented for the parties in the case before me, it is not controverted that Encik KP Ng has participated in the process of negotiating on a without prejudice basis with a view to arrive at an amicable settlement of the matter or proceedings herein.

The defendants through the affidavit in support affirmed by one Chong Toong Ming averred that the defendants wished to call, *inter alia*, Encik KP Ng as a witness as Encik KP Ng was involved in the discussion pertaining to the money deposited in the said account. As such, the defendants believed that Encik KP Ng might be involved in a conflict of interest and should not represent the plaintiff.

In response to Encik KP Ng's involvement in the aforesaid discussion, the plaintiff in para. 9 of her affidavit affirmed on 5 April 2001 that it was for the purpose of achieving an amicable settlement between the plaintiff and the defendants on a without prejudice basis, in which case Encik KP Ng, his firm or any assistant in his firm should not be called as a witness. This averment was not denied by the defendant and is therefore deemed to have been admitted. *Ng Hee Thong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609.

The issue for determination by me may thus be formulated as follows:

> Does r. 28(a) of the Legal Profession (Practice & Etiquette) Rules 1978 apply to an advocate and solicitor who in the course of his professional practice has been retained as advocate and solicior and is involved in a negotiation with a view to arriving at an amicable settlement?

It is trite law that advocates and solicitors have important and positive roles to play in the process of negotiation for an amicable settlement. A body of rules in this respect had been developed. The starting point is s. 23 of the Evidence Act 1950 which reads as follows:

> **23. Admissions in civil cases when relevant.**
>
> In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

> Explanation – Nothing in this section shall be taken to exempt any advocate from giving evidence of any matter of which he may be compelled to give evidence under section 126.

Under s. 23, *supra*, protection is given to exclude the admissibility of an admission of civil liability as such an admission is irrelevant if it is made:

(a) either upon an express condition that evidence of it is not to be given, or

(b) under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

The intention of s. 23 is to regulate the conduct of "without prejudice" communications and hence to promote peaceful settlement of disputes by way of compromise and not litigation, otherwise an attempt to arrive at an amicable settlement would not be possible: *Hoghton v. Hoghton*,, 15 Beav 278 per Romilly, MR. The law and public policy favour the exclusion of confidential overtures of pacification, offers or propositions expressly or impliedly on a "without prejudice" basis between litigating parties with a view to achieving an amicable settlement.

The use of the phrase "without prejudice" is so common and entrenched in the legal profession. Sarkar on "*Law of Evidence*", 14th edn. 1993 at p. 359 states as follows:

> **"Without Prejudice"**. – The words "without prejudice." simply means this: "I make you an offer, if you do not accept it, this letter is not to be used against me" (per James LJ) or "they are tantamount to saying, I make you an offer which you may accept or not, as you like; but, if you do not accept it, my having made it, is to have no effect at all" (per Mellish LJ, *In re River Steamer Co, Mitchell's Claim*, LR 6 Ch App 822, p. 832).

In *Oh Kuang Liang v. Associated Wood Ind Sdn Bhd, supra*, a paragraph in an affidavit which referred to certain 'without prejudice" letters between solicitors were held inadmissible. Abdul Malik bin Hj. Ishak, J referred to para 212 in *Halsbury's Laws Of England*, 4th edn. which said, *inter alia*, that oral communications made during a dispute between parties which are written or made for the purpose of settling the dispute, and which are expressed or otherwise proved to have been made "without prejudice" cannot generally be admitted in evidence. Justification for this rule is firmly founded on public policy to settle rather than to litigate: *Cutts v. Head* [1984] 1 All ER 597; *Scott Paper Co v. Drayton Paper Works Ltd* [1927] 44 RPC 151, *Mole v. Mole, supra*; *McTaggart v. McTaggart, supra; Pool v. Pool, supra.* There is a plethora of authorities including eg, *Re Daintrey; ex p Holt* [1893] 2 QB

116; *Bentley v. Nelson* [1963] WAR 89 (Australia); *South Shropshire District Council v. Amos* [1987] 1 All ER 340; *Rush & Tompkins Ltd v. Greater London Council & Anor* [1989] AC 1280 HL.

Within our shores, the without prejudice principle has been authoritatively set out in the illuminating judgment of Chang Min Tat, FJ (as he then was) in *Malayan Banking Bhd v. Foo See Moi* [1981] 2 MLJ 17 FC as follows:

> It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of the negotiations so that a solution acceptable to both sides can be more easily reached.

The above judgment of the Federal Court was followed by Abdul Malik bin Hj. Ishak, J in *Oh Kuang Liang, supra.* His Lordship in *Dusun Desaru Sdn Bhd v. Wang Ah Yu* [1999] 2 CLJ 749 also held that without prejudice communications are privileged communications. Further r. 28(a) is merely a rule of ethics and is not to be applied totally with the stringency of the force of law: per Wan Yahya, J in *Wee Choo Keong, supra.* It seems to me that r. 28(a) is somewhat inconsistent with s. 23 of the Evidence Act 1950. In the event of such an inconsistency, s. 23(1) of the Interpretation Acts 1948 & 1967 is to be invoked. Section 23(1) of the Interpretation Acts 1948 & 1967 provides as follows:

> **23. Avoidance of subsidiary legislation in case of inconsistency with Act.**
>
> (1) Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency.

This means that r. 28(a) would give way to s. 23 of the Evidence Act 1950 which prevails and that r. 28(a) is void to the extent of the inconsistency.

On the basis of the facts and circumstances of the instant case and in the light of the law relating to "without prejudice" communications as adumbrated above, I am of the view that r. 28(a), *supra,* does not apply here and so there is no merit in the application to disqualify Mr. KP Ng, his law firm or any of his legal assistants in his law firm from acting for the plaintiff. I therefore dismiss the second prayer in the defendant's application.

On the issue as to costs, in view of the fact that the application for the first prayer is allowed while that for the second prayer is dismissed, the fair and equitable order to be made as to costs is costs in the cause, which I do hereby order.